IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

DENNIS LEBLANC,	*	
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Petitioner,	*	
	*	
vs.	*	Civil Action No. 2:12-cv-340
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RANDALL MATHENA,	*	
	*	
Chief Warden, Red Onion State Prison, Pound, Virginia, and	*	
	*	
COMMONWEALTH OF VIRGINIA,	*	
	*	
Respondents.	*	

PETITIONER'S SUPPLEMENTAL BRIEF

On June 19, 2012, petitioner Dennis LeBlanc filed a petition for habeas corpus requesting this Court to grant him relief from his unconstitutional sentence under 28 U.S.C. § 2254. Mr. LeBlanc is serving two life without parole sentences for nonhomicide offenses committed when he was sixteen years old. Although Mr. LeBlanc challenged the legality of his sentence under Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010), the Virginia courts erroneously found that his sentence was constitutional because he can apply for release based on compelling reasons at the age of 60 under Virginia's geriatric provision. Va. Code Ann. § 53.1-40.01. This remote possibility of release does not remedy Mr. LeBlanc's unconstitutional life without parole sentences.

On October 11, 2013, this Court issued an order directing Mr. LeBlanc to: a) identify statistics involving juvenile nonhomicide offenders applying for conditional release under Virginia's

Geriatric Parole provision; b) provide an analysis of possible factors that could qualify as "compelling reasons for release" for geriatric parole; c) brief whether provisions similar to Virginia's Geriatric Parole exist in other states and, if so, whether they have been found to be distinguishable from the ruling in Graham; and d) address whether other states' provisions have been construed as being similar to executive clemency or whether they have been found invalid because any meaningful and realistic opportunity for release would occur close to or past a prisoner's life expectancy. This supplemental brief is filed in response to this Court's order.

I. THE GRAHAM V. FLORIDA DECISION DID NOT DISTINGUISH OTHER STATES WITH PROVISIONS SIMILAR TO VIRGINIA'S GERIATRIC PAROLE.

Virginia's geriatric provision, which allows an inmate to apply for release based on "compelling reasons" at age 60, is a statute designed to help control the budget and duties of the Virginia Department of Corrections. It is not a statute designed to review the appropriateness of a prisoner's sentence. This Court asked Mr. LeBlanc to identify whether provisions similar to Virginia's geriatric statute have been found to be distinguishable from the ruling in Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010). In Graham, the United States Supreme Court rejected the idea that these types of provisions were relevant to its conclusion that life without parole sentences for children convicted of nonhomicide offenses are unconstitutional.

Under Florida's laws, Terrance Graham had a possibility of release both through the state's executive clemency procedures, Fla. Stat. § 940.01, and through Florida's conditional medical release program, which allows an inmate to be conditionally released due to an existing physical or medical condition, Fla. Stat. § 947.149; Fla. Admin. Code Ann. r. 23-24.020. Nevertheless, the Supreme Court stated that Florida's life without parole sentence "deprives the convict of the most

basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." Graham, 130 S. Ct. at 2027 (citing Solem v. Helm, 463 U.S. 277, 300–01 (1983)); see also Solem, 463 U.S. at 300 ("Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases."). The mechanisms in Florida law that provided for the remote possibility of release did not bring Mr. Graham's life sentence in compliance with the Eighth Amendment. Graham, 130 S. Ct. at 2033. Instead, the Court ruled Florida was denying Mr. Graham "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child . . . ," id., and that states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 2030. Therefore, although certain state statutes might provide a prisoner a small chance of release based on age or medical infirmities, the holding in Graham makes clear that these types of provisions were not of the character and type necessary under the Eighth Amendment to provide a meaningful opportunity to rejoin society. See id. at 2034.

In its Graham decision, the Supreme Court recognized eleven states with children serving life without parole for nonhomicide offenses. Id. at 2024 (eleven states are Florida, California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia). At the time of the Graham decision, five of these jurisdictions, including Florida and Virginia, had provisions that provided the possibility of release based on age or medical infirmities that were applicable to children serving life without parole sentences for non-homicide offenses. See Del. Code Ann. tit. 11, § 4346(e) (permitting parole if removal from institution is necessary for well-being of inmate with physical or mental condition); La. Rev. Stat. Ann. § 15:574.20 (providing

medical parole procedure); Miss. Code Ann. § 47-5-139(1)(a) (allowing prisoner sentenced to life to petition for conditional release after reaching age 65 and serving at least 15 years). Despite the presence of these mechanisms that provide for the remote possibility of release, the Supreme Court still found that the juvenile nonhomicide offenders in these states, as well as in Virginia, had sentences of life imprisonment without the possibility of parole. Graham, 130 S. Ct. at 2024.

II. NO OTHER JURISDICTION HAS RELIED ON ITS GERIATRIC PROVISION, WHICH IS AKIN TO EXECUTIVE CLEMENCY, AS A CONSTITUTIONAL REMEDY FOR AN ILLEGAL SENTENCE UNDER GRAHAM V. FLORIDA.

This Court also asked us to address how other states with provisions similar to Virginia's geriatric parole have responded to the Graham decision. Of the ten other states that have provisions similar to Virginia's, none of these jurisdictions have found that their infirmity-based parole provision establishes a realistic and meaningful opportunity for parole based on maturity and rehabilitation.[1]

Mississippi is the only state to expressly address its geriatric parole provision in light of juvenile life without parole sentences. Parker v. State, 119 So. 3d 987, 997 (Miss. 2013) (applying Miller v. Alabama, 132 S. Ct. 2455 (2012)). The Mississippi Supreme Court agreed with the United States Supreme Court that its conditional release statute was like executive clemency. Id. The

[1] See Cal. Penal Code § 3550 (medical parole provision); Del. Code Ann. tit. 11, § 4346(e) (parole if necessary for well-being of prisoner with physical or mental condition); Fla. Stat. § 947.149 (conditional medical release program); La. Rev. Stat. Ann. § 15:574.4(A)(4) (conditional release at age 60 after 10 years in prison for non-violent offenders); La. Rev. Stat. Ann. § 15:574.20 (medical parole procedure); Miss. Code Ann. § 47-5-139(1)(a) (geriatric parole provision at age 65); Miss. Code Ann. § 47-7-4 (medical conditional release law); Neb. Rev. Stat. § 83-1,110.02 (medical parole provision); Nev. Rev. Stat. § 209.3925 (medical parole to residential confinement); Okla. Stat. tit. 57, § 332.7(A)(2) (geriatric parole provision at age 60); Okla. Stat. tit. 57, § 332.18 (medical parole provision); S.C. Code Ann. § 24-21-715 (parole for terminally ill, geriatric, or permanently disabled inmates).

Mississippi court found that the eligibility to petition for conditional release at the age of 65 "is more akin to clemency, which the Supreme Court has held '[a]s a matter of law' to be different from parole 'despite some surface similarities.'" Id. (quoting Solem, 463 U.S. at 300) (alteration in original). Although Mississippi law contains a geriatric parole provision, Miss. Code Ann. § 47-5-139(1)(a), as well as a separate medical conditional release law, Miss. Code Ann. § 47-7-4, the court did not accept these statutes as proper remedies for an unconstitutional life without parole sentence. Rather, the court ruled that a sentence of life imprisonment *with eligibility for parole* should be made available for juveniles when appropriate. Parker, 119 So. 3d at 999.

Additionally, other states have applied Graham by resentencing children to term-of-years sentences or by granting parole eligibility, without referencing or relying on infirmity-based provisions. In response to Graham, the Louisiana Supreme Court severed the provision of Louisiana's parole statute that prohibited parole eligibility for prisoners serving life sentences, making children serving life sentences in Louisiana for nonhomicide offenses parole eligible after serving twenty years and reaching age 45. State v. Shaffer, 77 So. 3d 939, 942 (La. 2011); La. Rev. Stat. § 15:574.4(A)(2).[2] Of particular relevance to Mr. LeBlanc's case, the Louisiana Supreme Court found that parole eligibility after serving twenty years and reaching age 45 was the appropriate remedy under Graham, rather than another provision of Louisiana's parole statute which would have

[2] In contrast to Virginia's geriatric parole provision, under which prisoners must initiate a process that requires the demonstration of "compelling reasons," without any guarantee of a hearing. Va. Parole Bd. Admin. P. No. 1.226, available at http://www.vadoc.state.va.us/vpb/manuals/pb-procmanual.pdf, Louisiana's remedy allows children with life without parole sentences to be evaluated by the parole board as to whether they have shown maturity and rehabilitation. Currently, the Louisiana parole board has considered six prisoners eligible for parole under Graham. Undersigned counsel at the Equal Justice Initiative has represented these inmates in their parole hearings, and 50 percent of them have been granted parole.

made prisoners eligible for relief under Graham parole eligible at age 60. See La. Rev. Stat. § 15:574.4(A)(4).[3] Courts in Florida have responded to Graham by replacing unconstitutional life without parole sentences with term-of-years sentences. See, e.g., Lavrrick v. State, 117 So. 3d 1141, 1142 (Fla. Dist. Ct. App. 2012) (affirming new sentence of 25 years plus 10 years probation). The California Supreme Court ruled that even a lengthy term of years sentence with parole eligibility that falls outside a prisoner's life expectancy violates the Eighth Amendment. People v. Caballero, 55 Cal. 4th 262, 268 (2012) (110 year sentence unconstitutional under Graham). And the state of Nebraska resentenced a juvenile with life without parole to a term of forty years and subsequently granted him parole after twenty years in prison. Nicholas Bergin, A Second Chance, A New Momentum, Lincoln Journal Star, Dec. 2, 2012, available at http://journalstar.com/news/state-and-regional/nebraska/a-second-chance-a-new-momentum/article_c39bfbc2-086d-5928-8407-f3f597b573e5.html. These states followed the Supreme Court's mandate in Graham by remedying unconstitutional juvenile life without parole sentences with procedures separate and distinct from their existing infirmity-based provisions for conditional release.

Similarly, after the United States Supreme Court's decision in Miller v. Alabama, 132 S. Ct. 2455 (2012), which rejected mandatory life without parole sentences for all children convicted of homicides, states complied with the ruling without referencing the infirmity-based provisions in their code. See, e.g., Del. Code Ann. tit. 11, § 4209A (amending juvenile sentencing scheme from life

[3] Subsequently, the Louisiana legislature amended the parole statute in Louisiana which makes children sentenced to life for a nonhomicide offense eligible after serving 30 years and reaching age 45, meaning that 47 is the oldest age at which a child sentenced to life can become parole eligible. La. Rev. Stat. Ann. § 15:574.4(D) (amended in 2012).

without parole to include minimum sentence of 25 years); Neb. Rev. Stat. § 28-105.02 (amending juvenile sentencing scheme from life without parole to include minimum sentence of 40 years). Again, the states recognized that a geriatric or medical parole statute was insufficient to remedy the constitutional violations explained by the Supreme Court in Graham and Miller.

Finally, while not reviewing a specific geriatric or medical parole provision, the Iowa Supreme Court found that allowing a prisoner an opportunity for release only when he or she is near or past life expectancy fails to bring a child's sentence in compliance with the Eighth Amendment. After Graham, the Iowa Supreme Court severed its statutory sentencing scheme to give juvenile nonhomicide offenders the possibility of parole. Bonilla v. State, 791 N.W.2d 697, 697 (Iowa 2010). In addition, the Iowa Supreme Court addressed a minimum sentence of 52.5 years imprisonment and held that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by Graham." State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) (applying Miller v. Alabama).

III. THE COMPELLING REASONS FOR RELEASE OF GERIATRIC PRISONERS ARE BASED ON AGE AND MEDICAL INFIRMITIES.

Additionally, this Court requested an analysis of possible factors that could qualify as "compelling reasons for release" for Geriatric Parole. The term "compelling reason" is not contained in the statute creating geriatric release, see Va. Code Ann. § 53.1-40.01, but was created by the parole board when it promulgated regulations to implement the statute. See Conditional Release of Geriatric Inmates, Va. Parole Bd. Admin. P. No. 1.226, (Doc 18-9, at *6-8.) The term "compelling reason" is not defined in the regulation or in the form that inmates are required to use when applying

for geriatric release. Petition for Geriatric Release, available at http://www.vadoc.virginia.gov/about/procedures/documents/800/820_F1.pdf. However, the Virginia Sentencing Commission has expressly stated that the purpose in creating Virginia's geriatric provision is to potentially release inmates who are 60 and older, and due to their age and infirmity, create significant cost increases for the Department of Corrections. (Doc 19-1, at 40.). Therefore, the "compelling reason" language in the regulation is necessarily related to the age and medical condition of the prisoner and is not responsive to Graham's requirement of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 130 S. Ct. at 2030.

Virginia's geriatric provision is consistent with what a number of other states have done to address the costs associated with this growing population of elderly and infirm prisoners. According to the Bureau of Justice Statistics, between 1995 and 2010, the general prison population grew from 1,085,022 to 1,550,600, an increase of about 43 percent. During that same time period, the number of prisoners aged 55 and over[4] increased from 32,600 to 124,900, an increase of 283 percent. Compare http://www.bjs.gov/content/pub/pdf/p03.pdf (Tbl. 10), with http://www.bjs.gov/content/pub/pdf/p10.pdf (Tbls. 12 & 13). Likewise, between 1990 and 2008, the Virginia Department of Corrections saw a nearly 600 percent increase in prisoners over the age of 50, from 715 to 4,678. VERA Institute of Justice, It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release, at 4, http://www.vera.org/sites/default/files/resources/downloads/Its-about-time-aging-prisoners-incre

[4] While Virginia's geriatric provision defines elderly inmates as age 60 and older, many of the available statistics on this population categorize elderly prisoners as either age 50 and older or age 55 and older.

asing-costs-and-geriatric-release.pdf. The increase in elderly inmates is largely the result of tougher sentencing practices, including mandatory minimums, three strikes laws, and truth-in-sentencing legislation which often requires prisoners serve 85 percent of their sentence before they are eligible for release. See, e.g., Human Rights Watch, Old Behind Bars: The Aging Prison Population in the United States, at 24, http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf.

The rising number of elderly inmates has created a corresponding increase in costs for departments of corrections, as expenses associated with incarcerating older prisoners are drastically higher. For example, in Virginia, the average offsite medical cost for a prisoner under age 50 was about $800, but the average offsite medical costs for prisoners 50 and over was $5,400. Human Rights Watch, at 77. It has been estimated that in general, the health care costs of elderly inmates is three to nine times higher than that of younger ones. Jamie Fellner, Graying Prisoners, The New York Times (Aug. 18, 2013), available at http://www.nytimes.com/2013/08/19/opinion/graying-prisoners.html. Therefore, in an attempt to address the increase in costs required to care for this growing population, Virginia, along with at least fourteen other states and the District of Columbia, have enacted statutes that provide a mechanism for elderly prisoners to apply for release based on illness or age-based infirmities.[5]

[5] Indeed, most of the states that have this type of provision either enacted the statute or amended their existing medical parole statute to include an age based provision in the 1990s and early 2000s, when the population of aging inmates began to grow rapidly. See Colo. Rev. Stat. § 17-1-102 (amended to included age-related provision in 2000); 2000 Colo. Sess. Laws Ch. 312; Conn. Gen. Stat. § 54-131k (enacted in 2004); D.C. Code § 24-465 (enacted in1993); Md. Code Ann., Crim. Law § 14-101(f) (enacted in 2002); Miss. Code Ann. § 47-5-139 (amended to include age-related provision in 1995); 1995 Miss. Laws Ch. 596; Mo. Rev. Stat. § 217.250 (amended to include age-related provision in 1994); 1994 Mo. Laws S.B. 763; N.M. Stat. Ann. § 31-21-25.1 (enacted in 1994); Okla. Stat. tit. 57, § 332.7 (amended to include age-related provision in 1997); 1997 Okla. Sess. Laws Ch. 133; Ore. Rev. Stat. § 144.122(1)(c) (amended to include age-related provision in 1993), 1993 Ore. Laws Ch. 198; Tex. Gov't Code § 508.146 (enacted in 1997); Va. Code An. § 53.1-

These statutes are not meant to provide an evaluation of an inmate's rehabilitation and potential for successfully reentering and becoming a contributing member of society. Instead of a mechanism to review the appropriateness of a prisoner's sentence, these statutes are intended to alleviate budgetary concerns of state departments of corrections by releasing prisoners who are costly to the system. The Graham decision requires states to give children convicted of nonhomicide offenses an opportunity to demonstrate their "maturity of judgment and self-recognition of human worth and potential." Graham, 130 S. Ct. at 2032. Consequently, Virginia's statute that provides prisoners the potential for release *only* if they can demonstrate a "compelling reason" related to medical and age-based infirmities does not satisfy the Eighth Amendment requirement that prisoners like Mr. LeBlanc have a meaningful opportunity for release based on demonstrated growth and rehabilitation.

IV. NO JUVENILE NON-HOMICIDE OFFENDERS ARE YET ELIGIBLE TO APPLY FOR VIRGINIA'S GERIATRIC PROVISION.

Finally, this Court asked Mr. LeBlanc to identify statistics on juvenile non-homicide offenders who have applied for geriatric release. However, Virginia first eliminated parole for any type of conviction or sentence other than the death penalty in 1982 and therefore, the oldest that a person who is parole ineligible and who was under age 18 at the time of their offense could be today is 49. Virginia's geriatric provision does not allow a prisoner to apply for conditional release until he or she turns 60. Consequently, no one who was sentenced to life in Virginia for a non-homicide offense as a child is eligible yet to apply for its geriatric provision.[6] In the Graham decision, the

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40.01 (enacted in 1995).

[6] There are two ways a child could be sentenced to life without parole in Virginia. First, in 1982, Virginia eliminated parole eligibility for "three time losers," who were convicted of three

Supreme Court stated that Virginia's Department of Corrections reported that there were eight juvenile nonhomicide offenders serving life without parole sentences. 130 S. Ct. at 2024. Most of these prisoners received their LWOP sentences under the 1995 statute, and consequently are decades away from being theoretically eligible for geriatric review under current law. See, e.g., Angel v. Commonwealth, 704 S.E.2d 386, 401 (Va. 2011); Pet. for Writ of Habeas Corpus (Doc 1, at *1), Blount v. Clarke, No. 2:12cv699 (E.D. Va. Dec. 21, 2012).

separate felony offenses of murder, rape, or armed robbery, for people who were convicted of three separate controlled substance related felony offenses, and for people serving life sentences who were convicted of escape. Va. Code. Ann. § 53.1-151 (B), (B1), (B2). Prior to the enactment of this statute in 1982 however, under Virginia law, every person convicted of a felony offense, except for persons sentenced to death, was parole eligible after serving a defined amount of time. Franklin v. Shields, 569 F.2d 784, 788 (4th Cir. 1977) (persons with term of year sentences parole eligible after serving one-fourth of term or twelve years, whichever is less, and persons serving life sentences parole eligible after serving fifteen years) (citing Va. Code Ann. § 53-239 (1976 Cum. Supp.)). Then, in 1995, Virginia abolished parole entirely for all felony convictions. Va. Code Ann. § 53.1-165.1. This is the provision under which Mr. LeBlanc is parole ineligible.

CONCLUSION

Virginia alone has chosen to argue that its geriatric provision satisfies the Graham requirement. Every other state has expressly or implicitly determined that the mere potential for release under an infirmity-based provision does not bring their sentencing laws in compliance with the Eighth Amendment. Habeas relief is necessary and warranted here because the last state court to reach the merits of the claim issued a decision that was an unreasonable application both of the facts and of clearly established Federal law. For these reasons, Mr. LeBlanc requests this Court to grant him habeas corpus relief under 28 U.S.C. § 2254.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of November, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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